No. 87-399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA, *et al.*,
Defendants/Appellants,

v.

MYRNA E. FRIEDMAN,
Plaintiff/Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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This brief is filed on behalf of the American Corporate Counsel Association in support of Appellee, Myrna E. Friedman. Consent from counsel for both parties has been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclu-

sively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has over 7,000 members who are employed as corporate counsel by some 3,500 organizations across the United States and in several foreign countries.

ACCA seeks to promote rules and procedures concerning access and admission to practices so that corporate counsel can adequately manage corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of a lawyer's residency in a state as a qualification for admission by motion to that state's bar is of great concern and importance to the members of the ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in the states which have such requirements for admission.

These rules particularly affect corporate counsel who, due to the nature of their practice, are often required to handle matters in several state and federal jurisdictions. These unnecessary and restrictive rules force corporate clients to provide time and incur expenses to have their attorneys study and take several bar exams; have their attorneys pursue a course of limited admissions to handle litigation matters through *pro hac vice* application; or hire local counsel. Such a result is a wasteful expenditure of corporate resources without providing the client, the court, or the public with an overriding benefit.

In addition, ACCA members as attorneys have an interest in ensuring that restrictions to practice serve the public interest and are not imposed for illegitimate objectives.

Because of the impact of bar admission restrictions on its members, ACCA has, during the past year, undertaken an examination of the current bar admissions system. This examination has consisted of both a study conducted for the association by the American Bar Foun-

dation,[1] and a symposium held in conjunction with the New York University School of Law and the American Bar Association.[2] The information ACCA has developed can assist the Court in evaluating the legitimacy not only of Virginia's residency requirement for admission on motion but of other state bar admission restrictions.

ACCA has always supported efforts to ensure that *all* attorneys attain and maintain a high level of legal proficiency in line with the public's expectation of quality professional legal service. Despite contentions by the Defendant to the contrary,[3] ACCA's goal is not to obtain a special admissions policy for corporate counsel which would exempt them from the requirements set for other attorneys. ACCA's official policy is to identify and eliminate instances where an attorney's practice or privileges are limited by the attorney's employment status.[4] With regard to bar admissions, ACCA "seeks equal treatment for all attorneys." [5]

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[1] AMERICAN CORPORATE COUNSEL INSTITUTE, CORPORATE LAW DEPARTMENT TRENDS AND THE EFFECT OF THE CURRENT BAR ADMISSION SYSTEM: A SURVEY OF CORPORATE COUNSEL (1987) [hereinafter cited as "ACCI Bar Admissions Report"].

[2] *Is it Time for National Bar Admissions?*, ACCI Symposium at N.Y.U. Law School (June 12, 1987).

[3] *See* Brief of Appellants, at 36-37. To support thier assertion that ACCA advocates a separate standard for corporate counsel admission, Defendant cites comments made by a program participant at ACCA's 1985 Annual Meeting. *See* brief of Appellants, at 36-37, *citing*, ABA/BNA LAWYERS MANUAL ON PROFESSIONAL RESPONSIBILITY, Vol. 1, No. 50, p. 1095 (Dec. 11, 1985). However, these comments reflect the views of the speaker, not that of the Association.

[4] ACCA Resolution Concerning Limitations on Corporate Practice, adopted by Board of Directors December 6, 1984.

[5] ACCA Admission-to-Practice Policy Statement, adopted by Board of Directors May 13, 1986.

> In pursuing this policy, ACCA will seek equal treatment for all attorneys. Recognizing that this process will be a lengthy one,

The challenged Virginia admission requirements do not address attorney competence. Instead, they constitute artificial barriers to practice which deter the provision of more cost effective legal services to those corporations that use inside counsel, as well as to the public in general. Thus, this case is of significant interest to the members of ACCA.

STATEMENT OF THE CASE

The Plaintiff in this case, Myrna E. Friedman, is an in-house corporate practitioner and member of ACCA who is employed as Associate General Counsel for ERC International, Inc., a company located in Vienna, Virginia, a suburb of Washington, D.C.

Prior to accepting her current employment with ERC International, Plaintiff, a member of the Bar of the District of Columbia, had been actively engaged in the practice of law, first as an attorney with the Department of the Navy in Arlington, Virginia and then as counsel to the Communications Satellite Corporation (COMSAT) in Washington, D.C. Beginning in 1977, and during this period, Plaintiff was a resident of the State of Virginia. Ms. Friedman accepted her current position at ERC International, Inc., in January 1986, where her responsibilities included advising her client on matters concerning Virginia law. In 1986 she married and moved into her husband's residence in Cheverly, Maryland. In connection with her employment as an attorney for a Virginia corporation, Ms. Friedman sought admission by motion to the Virginia bar but was denied admission on

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in the interim the association may support rules or amendments to rules which result in the more efficient delivery of quality legal services to the corporate client, or which otherwise represent a significant improvement in existing admission-to-practice rules. If such rules or amendments result in other-than-equal treatment for all attorneys, Board approval will be sought before any action on behalf of the association is taken. *Id.*

the grounds she was not a permanent resident of Virginia (*see*, Rule 1A:1 of the Supreme Court of Virginia).

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to make clear its prohibition against residency requirements and other restrictive bar admission criteria unrelated to competency. Such restrictions impede the ability of corporate counsel to efficiently provide legal counsel to their corporate clients and ignore the existence of a growing trend toward the national practice of law. The result of these unrelated restrictions is not protection of the public, but rather protectionism for the state's bar members through a lessening of interstate mobility for experienced, qualified attorneys.

It was properly held by both the federal district and appellate courts that Ms. Friedman's case is controlled by *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), wherein this Court stated:

> In summary, the State neither advances a "substantial reason" for its discrimination against nonresident applicants to the bar, nor demonstrates that discrimination practiced bears a close relationship to its proffered objectives. 470 U.S. at 287.

There is no basis for changing this finding merely because the applicants seek admission on motion rather than by examination. Residency in either situation has no bearing on an attorney's competence. Thus the same rationale for rejecting the residency requirement in *Piper* applies here.

That this same issue arises again indicates the urgent need for the Court to establish guidelines for the review of state bar admission restrictions to ensure that they have a substantial relationship to the objective of protecting the public. States invariably claim their bar restrictions have a legitimate objective and are related to

competency. To avoid further repetitious review of state bar requirements and to restore public confidence in the propriety of state bar admission rules this Court should articulate definitive standards to guide lower courts and state bar authorities.

In fashioning such guidelines the Court should take notice of both the existence of a national practice engaged in by major corporate law departments and large U.S. law firms, as well as the existence of a national consensus on relevant admission criteria. State bar restrictions must be reviewed in light of the present day national practice of law. When bar rules conflict with such practice the state should have the burden of proving the rules have a direct and substantial relationship to the objective of protecting the public by ensuring attorney competency. Furthermore, any requirements which are in addition to the three criteria for which there is a national consensus—(1) a degree from an ABA accredited law school; (2) passage of a bar examination; and (3) a character and fitness evaluation—should be shown to be directly and substantially related to competency and aimed at serving a legitimate public purpose.

ARGUMENT

I. ADMISSIONS ISSUES ARE A SERIOUS AND GROWING PROBLEM

The present case before this Court and its proximity in time to this Court's recent decision in *Piper*, 470 U.S. 274 (1985), is not coincidence. The problem of admissions is a growing problem, and one not peculiar to corporate counsel. This is caused in large part by the fact that there exists in the United States a national practice of law which involves the corporate as well as the private bar. As was noted by Professor Michael McChrystal of Marquette University Law School in a paper prepared for a symposium on uniform bar admissions held in June

1987 cosponsored by the New York University School of Law, the American Bar Association, and ACCA:

> The state-based system of bar admissions seems anachronistic. This is an era of multistate, even multinational law firms. Legal matters are often oblivious to state boundaries and send lawyers scurrying into the courtrooms and law offices of many states and nations. In sum, the practice of law is frequently multistate, but bar admissions still occur one state at a time.[6]

This *de facto* multistate practice of law occurs with the knowledge and acquiescence of state and local bars. The result, observed another symposium participant, Norman Krivosha, former Chief Justice of the Nebraska Supreme Court, is that:

> Overwhelming evidence suggests that one may engage in the interstate practice of law without first being admitted to practice in a particular state, so long as the individual does not appear in court.[7]

This observation is supported by a recent report of the American Corporate Counsel Institute ("ACCI") entitled, "Corporate Law Department Trends and the Effect of the Current Bar Admission System: A Survey of Corporate Counsel."[8] The report details results of a study of over 250 corporate law departments. The study found that a majority view as appropriate the rendering of legal advice to their corporate clients on matters involving state or federal law in jurisdictions in which they are not admitted. According to the report, 86% indicated that the provision of such advice with regard to

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[6] McChrystal, *National Bar Admissions: Sketching the Issue, reprinted in*, ACCA DOCKET, Summer 1987, at 16.

[7] Krivosha, *Seeing How It's Broke, How Come We Ain't Fixing It?, reprinted in* ACCA DOCKET, Summer 1987, at 6.

[8] ACCI Bar Admissions Report, *supra* note 1. (ACCI is the educational and research arm of ACCA.)

federal law was proper, while 58% said it would be appropriate to provide such counsel on the state laws of jurisdictions to which one was not admitted.[9]

In evaluating the proper role of the states in establishing bar admissions criteria, this Court should take into consideration the reality of current legal practice.[10] It makes little sense to permit or encourage admission practices which have little or no contact with reality and are honored by their wholesale disregard.

It is this growing gap between present day legal practice and admission requirements such as that struck down by this Court in *Piper* and the requirement sought to be imposed upon Ms. Friedman which creates the problem. If this problem is not addressed in a considered and comprehensive fashion, it will continue to recur to the detriment of the judiciary, the legal profession, the corporate community, and the public interest.

II. THIS COURT SHOULD ARTICULATE A CLEAR STANDARD AGAINST WHICH THE APPROPRIATENESS OF STATE ADMISSIONS RESTRICTIONS WILL BE MEASURED

This Court has long recognized that states have the authority to regulate the legal profession in order to insure the public of the competence of those who become members of the bar.[11] This Court has even articulated a

[9] *Id.* at 37.

[10] In this Court's decision in *Piper*, it was recognized that geographic proximity had little relevance to competence practice and that modern technology had made multistate practice feasible:

> [I]n many situations, unscheduled hearings may pose only a minimal problem for nonresident lawyers. Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters. 470 U.S. at 286, n. 21.

[11] *See, e.g., Leis v. Flynt*, 439 U.S. 438 (1979).

test by which that regulation must be guided, that is, there must be a "rational connection between the restriction and the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). ACCA does not question these principles. It does, however, suggest that the standard by which this and other courts must evaluate the rationality of the connection with that objective should be refined.

ACCA submits that any evaluation as to whether a state restriction is legitimate must give due regard to the contemporary reality of practice and the degree to which the restriction is consistent with accepted notions of lawyer competence. It is only by measuring the state restriction against these objective criteria that one can determine whether the real objective of the state restriction is to protect the public. This case presents the proper set of facts to develop and implement such a standard.

Since *Schware*, states invariably contend their admission restrictions are intended to promote competence. The real problem is determining whether the proffered reasons of the state are rationally related and intended to serve this objective. More directly stated, is the state restriction really designed to protect the public or the economic interests of the bar? A recent dispute between New York and New Jersey over reciprocal admissions illustrates the problem of admission criteria being used to serve economic interests.

As was reported by the American Bar Association's periodical the *Bar Leader*:

> Lack of reciprocity in bar admissions among several states has prompted the New York State Bar Association to ask the New York Court of Appeals to impose a moritorium on admissions sought by lawyers in such states.

* * * *

Although the resolution applies to all nonreciprocating states, the bar's concerns center on adjacent New Jersey.

* * * *

New Jersey's rule has had an economic impact on New York lawyers, particularly those near the New Jersey border, said Eugene Setel of Buffalo, immediate past chairman of the state bar's Committee on Legal Education and Admission to the Bar. 'Several New York state practitioners complained they were being discriminated against,' Setel said. 'They said they lived on the border and were losing business. As soon as lawyers are admitted in New Jersey, they make notes in their diaries to walk across the state line [into New York] in five years.'

* * * *

Like New York lawyers, New Jersey lawyers cite a potential economic impact if the state changes its admission rule. They fear lawyers in New York and neighboring Pennsylvania would take away their business.

* * * *

The New York state bar's appeal was 'an unnecessary reaction,' said Bernard Conway of Morristown, president of the New Jersey bar. 'The claim that the New Jersey requirement is hampering people is without merit.' Many New York law firms have offices in New Jersey, Conway said. The state bar continues to oppose a rule change, he added.

Ronald Levine of New York, chairman of a New York state bar subcommittee on interstate bar relations, said he took the New Jersey bar exam in February and maintained that it does not test New Jersey law. 'They can't argue that it is needed to be knowledgeable of New Jersey law,' said Levine, who cowrote the legal education committee's report. 'It's just a question of fairness.' [12]

[12] *N.Y., N.J. Bar Feud Over Admission Rules*, ABA BAR LEADER, Nov.-Dec. 1987, at 4.

Most noticeable in this debate is the absence of even the slightest reference to what is in the client's or public interest. A duplicitous situation has arisen in which attorneys and bar officials cite economic concerns when discussing bar rules in the press, but then claim to be only concerned about competency and the public welfare when defending restrictive admission requirements before the courts. The manipulation of bar admission rules for these improper objectives accounts for the conclusion of the ACCI study that:

> Current bar admission rules are therefore viewed as artificial barriers which are perceived as ultimately harming both the corporate client, financially and by denying that particular client access to more competent counsel, and the corporate attorney who wishes to be a responsible member of the local legal community.[13]

III. STATE BAR ADMISSION RULES INCONSISTENT WITH THE MULTISTATE PRACTICE OF LAW MUST HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO PROTECTING THE PUBLIC INTEREST BY ENSURING COMPETENCY

Serving the public interest should be the objective of bar restrictions. Ascertaining that interest is not often easy, however. At least in one respect the public has voiced its interest since it has created the multistate practice of law. The move to in-house counsel, like the move to multistate law firms, has been a response to a pressing public need. The public has expressed what serves its needs and courts should be loathe to ignore such a clear expression unless the state can prove the rule has a direct and substantial relationship to protecting the public interest by ensuring competency. Absent that proof, the conclusion must be that the state restriction has an improper objective.

Whether a national bar admission system should be instituted is not before this Court. However, it is clear

[13] ACCI Bar Admissions Report, *supra* note 1, at 43.

that a national practice of law exists *de facto*. Further, it must be recognized that there are limits to a state's discretion in imposing bar admission requirements, and one such limit is that the rule must be aimed at serving the public interest and not the private interests of the lawyers practicing in a particular state. Given the development of a national practice resulting from the needs of the public, it is incúmbent upon states to show that its restrictions are directly and substantially related to a legitimate objective.

In brief, Virginia has a right and obligation to regulate the practice of law to ensure its citizens are protected from incompetent legal counsel. However, this right does not extend to the imposition of standards unrelated to competency,[14] nor to the imposition of standards which are meant to prevent its attorneys from engaging in multistate practice.

The argument that, if residency and other restrictions are removed, states will resort to requiring everyone to pass the bar examination, is little more than a veiled threat inconsistent with logic. Virginia and other states already recognize that having experienced and competent attorneys retake a bar examination is an unnecessary practice. This situation should not change simply because a requirement unrelated to competency is removed.

IV. STATE BAR ADMISSION CRITERIA IN ADDITION TO THOSE UPON WHICH THERE IS A NATIONAL CONSENSUS MUST HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO PROTECTING THE PUBLIC INTEREST BY ENSURING COMPETENCY

The ACCA symposium on bar admissions held in June 1987 at the New York University School of Law revealed a general consensus on bar admission criteria. As was observed by Professor McChrystal:

[14] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985) (holding residency requirement for admission unconstitutional under Article IV, § 2, cl. 1 of the United States Constitution).

> There is a widespread agreement among states on the criteria for bar admission. All states impose character and fitness, education, and testing requirements on some or all bar applicants. . . . The national bar admission debate concerns not the widely divergent views regarding appropriate criteria for admission—there are not—but the extent to which these universal criteria should be uniformly applied throughout the states.[15]

This consensus is also reflected in a report by the American Bar Association and the National Conference of Bar Examiners.[16] According to the report all 50 states accept applicants for admission who have graduated from an ABA accredited law school, and all of the states have certain testing requirements for most applicants.[17] Forty-six of these states administer the multistate bar examination.[18] In addition, as this Court has previously noted, all states assess and evaluate the fitness and character of candidates as part of their bar admission requirements.[19]

The second element of the test then is to see if the state restriction adds a requirement in addition to the three criteria for which there is national consensus: (1) a degree from an ABA accredited law school; (2)

[15] McC'rystal, *supra* note 6, at 16.

[16] A.B.A. SEC. LEGAL EDUC. & ADMISSIONS AND NAT'L CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (1986).

[17] *Id.* at 8-9.

[18] *Id.* at 14-15.

[19] *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971).

> This Court itself requires of applicants for admission to practice before it that 'their private and professional characters shall appear to be good.' Every State plus the District of Columbia, Puerto Rico, and the Virgin Islands, requires some similar qualification. 401 U.S. at 160 (footnotes omitted).

passing a bar examination; and (3) a character and fitness evaluation.

When a candidate presents himself or herself for admission and possesses each of these criteria, a state should show that any additional requirement has a direct and substantial relation to competency and is aimed at serving a legitimate public purpose. This applies also to situations where a state essentially requires the duplication of a previously obtained objective. For example, if an applicant passed a character evaluation for Illinois, New York should not be permitted to require a second character evaluation unless it demonstrates the Illinois lawyer's character review is unacceptable for New York practice. Another example would be a state requirement that the multistate examination be retaken even though the score would have been more than adequate to pass the state requirement if the examination was taken for that state.

Where a state essentially requires the duplication of previously attained objectives, the duplication without substantially more has to be treated as suspect.

V. THE VIRGINIA RESTRICTION IS NOT DIRECTED AT PROTECTING THE PUBLIC AND SHOULD BE OVERTURNED

Ms. Friedman has been a practicing attorney for more than ten years. Six of these years she has served as an inside corporate counsel. Clearly, Ms. Friedman is an experienced lawyer of the type to which, but for Virginia's residency requirement, the state's admission on motion rule was intended to apply.

It is equally clear, that Virginia's residency requirement conflicts with, and is even intended to prevent, multistate practice.[20] Given the restriction's inconsistency with the present day national practice of law, Virginia should be required to prove that its residency restriction has a direct and substantial relationship to protecting the public interest by ensuring competency. This burden cannot be met where the effect of the rule is to discriminate against equally qualified applicants. It is undisputed that someone with the exact same qualifications as Ms. Friedman, who resided in Virginia, would be granted admission. Competency is thus not the distinguishing factor.

[20] *See* Brief of Appellants, at 28.

The residency requirement imposed by Virginia is one which is in addition to those criteria on which there is a national consensus. The requirement fails to have a direct and substantial relation to competency. Ms. Friedman has met all the consensus criteria for admission. The sole reason she was denied admission on motion by Virginia is that she resides in Maryland. On which side of the Potomac River Ms. Friedman sleeps can hardly be a determinative indication of whether she is a competent and experienced attorney who has "made such progress in the practice of law that it would be unreasonable to require [her] to take [Virginia's] examination." Rule 1A:1 of the Supreme Court of Virginia.

In sum, the reasons offered by Virginia for its residency requirement fall far short of being credible, let alone compelling.

CONCLUSION

ACCA believes the time has come for this Court to acknowledge in explicit terms what has long been recognized by the profession, that state admission criteria are being manipulated in many instances for objectives which are aimed less at the public good than to serve the bar's parochial economic interests. This has resulted, as the ACCI study of the corporate bar has shown, in a perception that these rules harm the clients rather than serve them. This perception should be of grave concern to this Court, as it should be to all lawyers.

Our legal profession can only function successfully if it enjoys the public trust and confidence. It is difficult to maintain that public trust when restrictive rules limiting the mobility of experienced, qualified attorneys are adopted and justified without sufficient connection to the public interest.

This case presents this Court with the opportunity to avert a substantial crisis and rededicate this profession to its primary objective, to serve the public good. By adopting the tests which ACCA advocates, ACCA believes this Court will create an environment which will significantly reduce the abuse of the bar admissions process and reestablish credibility in its propriety.

For these reasons, and because of its conflict with this Court's decision in *Piper*, the Court should affirm the appellate court's ruling below.

Respectfully submitted,

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